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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1454

JOSEPH ANTHONY DAVIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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JOSEPH ANTHONY DAVIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 26, 1972.

Opinions Below

The first opinion of the Court of Appeals is reported at 432 F.2d 1009 and is set out in the Appendix, *infra*, at p. 1a. The oral findings of the district court following the hearing on remand are set out in the Appendix, *infra*, at pp. 2a-6a. The district court's findings of fact and conclusions of law following that hearing on remand are unreported and are set out at pp. 7a-10a, in the Appendix, *infra*. The second Court of Appeals opinion affirming petitioner's conviction is reported at 447 F.2d 1376 and is

set out in the Appendix, *infra*, at p. 11a. The order denying rehearing is unreported and is set out at p. 12a of the Appendix, *infra*. The order of this Court denying certiorari is reported at 405 U.S. 933 and is set out in the Appendix *infra* at p. 13a. The order of the Court of Appeals denying petitioner's motion for leave to file an out of time petition for rehearing with a suggestion for rehearing *en banc* is unreported and is set forth *infra* in the Appendix at p. 14a. The findings of the district court denying petitioner's motion pursuant to 28 U.S.C. §2255 is unreported and is set out in the Appendix *infra* at pp. 15a-17a. The judgment of the Court of Appeals, here sought to be reviewed, affirming the district court's denial of relief under 28 U.S.C. §2255 is reported at 472 F.2d 596 and is set out *infra* in the Appendix at pp. 18a-19a.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit, affirming the denial of relief under 28 U.S.C. §2255 was entered on December 26, 1972. On March 21, 1973, Mr. Justice Douglas signed an order extending the time to file this petition up to and including April 25, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the Court of Appeals erred in holding that a change in the law which occurred after appellate affirmance of a conviction could not be considered in a proceeding brought under 28 U.S.C. §2255.

2. Whether the decision below is in conflict with prior decisions of the Court of Appeals, and whether such court's persistent refusal to resolve the intra-circuit conflict compels action by this Court.

3. Whether the decision below is inconsistent with the decision of this Court in *Gutknecht* v. *United States*, 396 U.S. 295 (1970).

4. Whether the decision below is in conflict with prior decisions of the Court of Appeals of the Fifth and Fourth Circuits.

Constitutional Provisions, Statutes and Regulations Involved

This case involves the Fifth Amendment to the Constitution of the United States; Chapter 153 of Title 28, United States Code (28 U.S.C. §2255); the Military Selective Service Act of 1967 (50 U.S.C. App. §451 *et seq.*) 32 C.F.R. 1602.4 (1967); 32 C.F.R. Part 1642 (1967); 32 C.F.R. 1631.7 (1967); and 1631.7 (1970).

Statement of the Case

Petitioner registered with Selective Service Local Board No. 101, Los Angeles, California, on October 4, 1963 (8a).[1] On February 3, 1965, he was classified I-A. On February 16, 1965, he was ordered to report for an Armed Forces physical examination on March 4, 1965 (20a). On the appointed day, petitioner failed to report but subsequently

[1] "a" references refer to the appendix to this petition.

contacted the local board and explained that his failure to report was due to illness (SSF 28).[2] On September 19, 1965, petitioner was ordered to report for a pre-induction physical examination on October 8, 1965 (20a, SSF 30). The order was mailed to a post office box address in Los Angeles supplied to the local board by petitioner. On September 22, 1965, the order was returned to the local board, stamped, "Addressee Unknown" (SSF 31). Petitioner did not report for his pre-induction physical on October 8, 1965. Subsequently, on December 6, 1965, petitioner was mailed a California Selective Service Form 304, "Delinquency Warning" (21a, SSF 32), which notified petitioner that his local board was "considering declaring you to be delinquent..." and further that,

> "A delinquent registrant loses his eligibility for deferment and may be placed in a class immediately available for service. He is ordered for induction ahead of other registrants . . . any further noncompliance on your part could result in your immediate induction" (21a, SSF 32).

This notice was mailed to the same Los Angeles post office box as the previous physical examination orders had been mailed to. In addition, the "Delinquency Warning" was mailed to another Los Angeles address, "3781¼, Menlo." The "warnings" were received back at the local board on December 15, 1965, and April 14, 1966, respectively, stamped, "Unknown" (SSF 33-35). Thereafter, on May 4, 1966, petitioner's local board declared him to be a delinquent pursuant to 32 C.F.R. Part 1642, et seq.,

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[2] "SSF" references refer to petitioner's paginated Selective Service File, Government's Exhibit 1 in the trial court.

and mailed him a Delinquency Notice, SSS Form 304 (22a) at the "Menlo" address. On the same day, petitioner appeared at the local board and completed a Current Information Questionnaire, again giving the "Menlo" address as his current mailing address (SSF 41). Thereafter, on February 21, 1967, petitioner was ordered to report for induction (23a). On the face of the induction order was typed the word "Delinquent" (23a). Mailed to the "Menlo" address, the order was returned to the local board undelivered on February 23, 1967 (SSF 44).

On the day set for his induction, March 7, 1967, petitioner did not report (20a). His selective service file was subsequently forwarded to the California State Headquarters of Selective Service for review. It was then returned to the local board with instructions from the State Director to reorder petitioner for induction by mailing such an order to a third address in St. Paul, Minnesota, previously supplied to the local board by petitioner (SSF 46). On June 20, 1967, an order to report for induction on July 11, 1967 was mailed to petitioner at his Minnesota address. As did the previous induction order, the order of June 20th had the word "Delinquent" typed on the face (24a). The Minutes of Action (20a), also reflect that petitioner was ordered "as Del [*sic*]." On July 11, 1967, petitioner failed to report for induction.

Proceedings Below

Petitioner was originally tried to a jury and convicted of having failed to report for induction on the July 11, 1967, date. On appeal, the Ninth Circuit remanded without limitation of scope but especially for consideration of the case

in light of . . . Gutknecht v. United States . . ." 432 F.2d at 1010 (1a). On remand the district court, Hauk, D.J., found:

"... 21 others were younger than [petitioner and] were called up either before or at the same time he was on the order of call, and to me that means that there was no acceleration. Now, turning to the second issue. Even if there were acceleration in a technical sense, that is not acceleration out and beyond and different from his proper date of birth order of call, even if there could be considered some technical acceleration in that he may have been called up as a delinquent when he might not have been called up as a non-delinquent at that particular moment, even though it would be within the proper order of call at that time which was based upon oldest men going up first, or being called up first, even if there were this technical acceleration, still I do not find this so-called affectation or prejudicial affection of substantial rights, or prejudice to substantial rights of the Defendant Davis that in my view the cases in the Ninth Circuit and cases elsewhere, including Gutknecht, require as a part of acceleration in order to hold that a defendant should not have been convicted or should not be convicted for violation of the order for induction" (3a-4a).

Judge Hauk went on to hold that:

"... even though he didn't take his physical examination, and there was no statement of acceptability, that is not required, as I see it, under 1631.7, a regulation which has not been outlawed or declared unconstitutional or illegal by Gutknecht, and which provides that one who is a delinquent may be selected and ordered to

report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces, and regardless of whether or not a statement of acceptability, DD62, has been mailed to him. And what is a delinquent as defined in 1602.4 of 32 Code of Federal Regulations is a person required to be registered under the Selective Service law who fails or neglects to perform any duty required by him under the terms of the Selective Service Law, and this 1602.4 has not been outlawed either by Gutknecht" (4a).[3]

On the second appeal, the Ninth Circuit, in a short per curiam handed down on August 12, 1971, affirmed the conviction finding no "acceleration" within the meaning of *Gutknecht* v. *United States*, 396 U.S. 295 (1970). 447 F.2d 1376. In addition, the court ruled, without explanation, that the plainly conflicting opinion of the Fourth Circuit in *United States* v. *Dobie*, 444 F.2d 417 (1971) was "distinguishable" (11a).

A petition for rehearing with a suggestion for rehearing *en banc* was denied on September 13, 1971 (12a).

On November 12, 1971, a petition for certiorari, No. 71-661, was filed.

In response to the petition for certiorari, the Solicitor General in his initial Memorandum for the United States in Opposition, conceded at page 7 thereof,

"that regulations applicable when [petitioner] was ordered to report permitted local boards to issue in-

[3] In support of these contentions, the district court relied substantially on the reasoning of Judge Neville of the Minnesota District Court in *United States* v. *Crocker*, 313 F. Supp. 831 (1970), which opinion we respectfully submit, is totally in error.

duction orders to delinquents without a prior pre-induction-physical and statement of acceptability, and that [petitioner] received his order pursuant to those regulations."

Following the filing of the petition for certiorari and the Solicitor General's Memorandum In Opposition, the court below, on December 30, 1971, decided the cases of *United States* v. *Fox*, 454 F.2d 593, and *Zack* v. *Benson*, 454 F.2d 596. These decisions held that registrants like petitioner who had been ordered to report for induction as delinquents pursuant to 32 C.F.R. 1631.7(b), and whose delinquency status had stemmed from the failure to report for a pre-induction physical examination, were illegally ordered for induction as a matter of law under this Court's decision in *Gutknecht* v. *United States, supra.*

These cases were brought to the attention of this Court by way of a Supplemental Memorandum. The Solicitor General, in response, filed his own Supplemental Memorandum For the United States In Opposition. At page 2 thereof, it was conceded that

> "the holdings in *Fox* and in the present case are inconsistent . . ."[4]

Nevertheless, he urged this Court to deny certiorari on the theory that,

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[4] The statement by the panel sitting in *Fox, supra*, that "the nature of the delinquency" did not appear in petitioner's case, 454 F.2d at 594, was, with all due respect, plainly erroneous. The record in this case clearly divulges, and the government acknowledged both before this Court and before the Ninth Circuit in its unsuccessful Petition for Rehearing in *Fox*, at page 11 thereof, that the basis for petitioner's delinquency was identical to Fox's—failure to report for a physical examination.

"the conflict is an intra-circuit one and presumably will be resolved by the Ninth Circuit itself . . . " *Id.*

Thereafter, certiorari was denied on February 22, 1972, 405 U.S. 993 (13a). In light of the Solicitor General's suggestion that the conflict between *Fox, supra,* and petitioner's case be resolved by the Ninth Circuit itself, the denial of certiorari seemed understandable. See *United States ex rel. Robinson* v. *Johnston,* 316 U.S. 649 (1942); *Wisniewski* v. *United States,* 353 U.S. 901 (1957).

Accordingly, a motion for an extension of time in which to file an out of time petition for rehearing with a suggestion for rehearing *en banc* accompanied by the petition for rehearing *en banc* itself was tendered to the Court below on April 19, 1972. The petition requested the Court to resolve the concededly existing conflict between the opinion in *Davis II,* 447 F.2d 1376, and *Fox,* 454 F.2d 593.[5]

On May 22, 1972, however, the Ninth Circuit denied the motion and returned the petition for rehearing to petitioner's counsel (14a).

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[5] It is difficult to imagine a case which could more clearly have warranted *en banc* reconsideration than petitioner's; especially in view of the government's own attempts to secure a rehearing in *Fox.* Indeed, the panel which decided the opinion below appeared to have recognized the need, at least procedurally, for such an *en banc* determination of petitioner's case. See *Davis III* at n. 1 (19a).

Further, neither the passage of time, *Huddelston* v. *Dwyer,* 322 U.S. 232 (1944), nor the prior denial of certiorari, *Braniff Airways Inc.* v. *Curtiss-Wright Corp.,* 424 F.2d 427, 429-430 (2d Cir. 1970); *Meehan* v. *Macy,* 425 F.2d 469 (D.C. Cir. 1968), was a bar to rehearing *en banc* at that time. Cf. *Davis* v. *Balkcom,* 369 U.S. 811 (1962). See also, Stern and Gressman, SUPREME COURT PRACTICE 213-215 (1969). The petition, under Ninth Circuit law, could also have been properly construed as a timely motion to recall the mandate. *Munoz and Tigar* v. *United States District Court for the Central District of California,* 446 F.2d 434, 436 (9th Cir. 1971).

Thereafter, on June 5, 1972, the District Court spread the judgment of this Court denying certiorari and remanded petitioner to custody[4] to begin serving his sentence of three years imprisonment. At the same time, petitioner's motion seeking relief under 28 U.S.C. §2255 was forthwith denied (16a). Motions made for bail pending an appeal of the denial of the §2255 motion as well as a motion under F.R. Cr. P. 35 for reduction or modification of sentence were taken under advisement. The Rule 35 motion was thereafter granted by the district court and petitioner was subsequently released from incarceration after having served a total of four months of his three year term and he was ordered placed on probation for the remainder.

An appeal to the Ninth Circuit from the summary denial of relief under 28 U.S.C. §2255 followed and it is from that decision affirming the denial of post-conviction relief, 472 F.2d 596 (18a), for which certiorari is here sought.

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[4] Petitioner had been at large on $10,000.00 bail pursuant to orders of Mr. Justice Douglas dated November 27, 1971 and January 8, 1972.

REASONS FOR GRANTING THE WRIT

I.

The decision below is in direct conflict with this Court's decisions in *Kaufman* v. *United States*, 394 U.S. 217 (1969) and *Sanders* v. *United States*, 373 U.S. 1 (1963) holding that an intervening change in the law, after appellate affirmance of a conviction, may be considered in a post-conviction proceeding.

Declaring that the issues tendered by the petitioner on his motion under 28 U.S.C. §2255 were

> "precisely the same as the ones presented and decided adversely to [him] in *United States* v. *Davis*, 447 F.2d 1376 (9th Cir. 1971), cert. denied 405 U.S. 933 (1972)" [1] (19a),

the Court below held that its prior decision in *Davis II*, *supra*, "is the law of the case," *ibid.*, and thus, relief under §2255, was barred. In support of this ruling the court below relied upon its prior decision in *Odom* v. *United States*, 455 F.2d 159 (9th Cir. 1972).

The decision below is fundamentally at odds with this court's decisions in *Kaufman* v. *United States*, 394 U.S. 217 (1969) and *Sanders* v. *United States*, 373 U.S. 1 (1963). See also *Thornton* v. *United States*, 368 F.2d 822, 831 (D.C. Cir. 1966) (dissenting opinion of Wright, C.J.); *Tucker* v. *United States*, 427 F.2d 615, 617-618 (D.C. Cir. 1970);

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[1] Hereinafter referred to as *"Davis II."*

United States v. *Sorenson*, 308 F. Supp. 1268, 1271 (E.D.N.Y 1970).

Petitioner here has claimed that the intervening decisions of the Ninth Circuit in *United States* v. *Fox*, 454 F.2d 593 (1971) and *Zack* v. *Benson*, 454 F.2d 596 (1971), rendered while his petition for certiorari in *Davis II* was pending, effected a change in the law of the Ninth Circuit. The Solicitor General so conceded. See Supplemental Memorandum for the United States in *Davis* v. *United States*, No. 71-661 (Oct. Term, 1971), at p. 2. Such a change in law has been explicitly recognized as a ground for post-conviction collateral relief notwithstanding the existence of a previous affirmance of a conviction. In *Sanders* v. *United States*, *supra*, this Court, after stating that a §2255 motion was to be subjected to no greater finality limitations than a petition for habeas corpus, 373 U.S. at 14, and accordingly notions of *res judicata* were inapplicable, *id.* at 8, went on to hold that,

> "If purely legal questions are involved, the applicant may be entitled to a hearing upon showing an intervening change in the law . . . " 373 U.S. at 17.

Six years later, in *Kaufman* v. *United States*, *supra*, this Court adopted the rationale of Judge Wright's dissenting opinion in *Thornton* v. *United States*, *supra*, wherein a change in law was specifically cited as a ground for granting relief under §2255. 394 U.S. at 230. See also *Tucker* v. *United States*, *supra*:

> ". . . . at least one of appellant's claims rests upon an intervening change in the law, which would entitle him to a new hearing *even if the merits had been determined*

adversely to him prior to that time." 427 F.2d at 617-18 (footnote omitted) (emphasis added).[8]

A review of the Ninth Circuit's opinion in *Odom* v. *United States*, upon which the decision below rests, reveals that it is based upon two prior Ninth Circuit cases both decided before this Court's opinion in *Kaufman, supra*, and one decided even prior to *Sanders, supra*. In addition, in *Odom*, it was noted that the decision there under construction which had established a change in pre-existing law had itself already spoken to the issue of retroactivity, see 426 F.2d at 74, and limited the new rule announced to the cases of those whose convictions had not become final as of the date of the decision announcing the new rule. Here, however, it is precisely that question which petitioner sought to raise—the retroactive application of the decision in *Fox, supra*.[9]

The effect of the ruling below is that petitioner's collaterally raised constitutional challenge to his conviction will never be heard or determined, unless this Court grants

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[8] The per curiam opinion below seems also to conflict with the Ninth Circuit's own prior holding in *Jack* v. *United States*, 435 F.2d 317 (1970), wherein it was stated that,

> "The fact that the legal claim has been determined in an appellate proceeding by this court is not necessarily determinative in a section 2255 proceeding. There are circumstances where the district court would be compelled, even in the face of such an appellate determination, to hold an evidentiary hearing on the claims of a federal prisoner." 435 F.2d at 319.

[9] No valid reason appears to grant relief to the petitioner in *Zack* v. *Benson, supra*, who had ignored the regular appellate process, see *Sunal* v. *Large*, 332 U.S. 172 (1946), and to deny it to petitioner. If anything, the fact that petitioner did not appeal makes him more entitled to relief than Zack. See *Sunal* v. *Large, supra*, at 181.

certiorari.[10] The procedural posture in which petitioner has thus become entangled is the result of a complete and utter disregard for the holdings of this Court in *Kaufman* v. *United States, supra,* and *Sanders* v. *United States, supra.* The action of the Court below is the functional equivalent of a suspension of the writ of habeas corpus because of erroneous notions of finality. Cf. 28 U.S.C. §2244. The petition should be granted so that this Court can clarify whether there are any limitations on the right to obtain post-appellate review of a conviction, when there is an intervening change of law in the defendant's benefit.

II.

The decision below should be vacated because it is in irreconcilable conflict with other decisions of the Ninth Circuit and that Court has repeatedly declined to resolve the conflict.

All parties to this litigation apparently agree that the decisions below are in direct conflict with *United States* v. *Fox* and *Zack* v. *Benson,* both *supra.*[11] See *supra,* pp. 8-9.

The reasoning and decision in *Fox* may be summarized as follows:

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[10] All attempts by petitioner to seek *en banc* resolution of his own case and thus to harmonize conflicting Ninth Circuit decisions, see pp. 8-9, *supra,* have been futile. See *Maggio* v. *Zeitz,* 333 U.S. 56, 59-60 (1947); *Dickinson* v. *Petroleum Corporation,* 338 U.S. 508 (1949); *John Hancock Mutual Life Insurance Company* v. *Bartels,* 308 U.S. 180 (1939). Compare, *Robinson* v. *Johnson, supra; Wisniewski* v. *United States, supra.*

[11] See also *United States* v. *McClintock,* 311 F.Supp. 1119 (N.D. Cal. 1970); *Swartz* v. *United States,* 3 SSLR 3424 (C.D. Cal. 1970).

32 C.F.R. §1642.4, at all times pertinent, described a selective service delinquent as one who has

> "failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction . . ."

In *Gutknecht* v. *United States,* 396 U.S. 295 (1970), the duty transgressed was the requirement that a registrant have in his personal possession a registration certificate and current classification notice. 32 C.F.R. §§1617.1; 1623.5. In *Fox,* the case was identical to *Peet* v. *United States,* 399 U.S. 523 (1970), vacating 420 F.2d 549 (9th Cir. 1969), where the petitioner had been convicted of failing to report for induction as a delinquent—his delinquency status stemming from a prior refusal to undergo a pre-induction physical examination in violation of 32 C.F.R. §1627. See also *United States* v. *Kohls,* 441 F.2d 1076 (9th Cir. 1971).

Delinquency status, prior to the decision in *Gutknecht,* permitted, *inter alia,* three types of action to be taken by a local board which would hasten a registrant's induction. First, he could be reclassified from a deferred or exempt status into classification I-A (available for military service). 32 C.F.R. §1642.12. Second, a registrant in Class I-A, either classified properly or as a result of a "punitive reclassification" under 1642.12, *supra,* could be inducted prior to all other registrants under the then prevailing regulatory scheme. See 32 C.F.R. §§1642.13; 1631.7; *Gutknecht, supra* at 298. The third possibility, is that 32 C.F.R. §1631.7, as then in effect, permitted the induction of a registrant who was delinquent and I-A

> "notwithstanding the fact that he has not been found acceptable for service in the armed forces and has not

been mailed a Statement of Acceptability (DD Form No. 62)." 32 C.F.R. §1631.7 (1963).

Other than delinquents, the only registrants who could be inducted without a pre-induction physical examination were volunteers, 32 C.F.R. §1628.10 (1951), or conscientious objectors classified I-O. 32 C.F.R. §1660.20(a); *United States* v. *Hayden*, 445 F.2d 1365, 1370 (9th Cir. 1971).

Thus, delinquent registrants such as Fox and petitioner Davis could be subjected to a third form of treatment which is no less in violation of the congressional mandate, relied upon by this court, in *Gutknecht, supra,* that

> "selection of persons for training and service [be carried out] in an impartial manner." 50 U.S.C. App. §455(a)(1) (1965 ed., Supp. IV). 396 U.S. 304.

As was Fox, petitioner was unarguably ordered to report for induction as a delinquent. He also had been declared delinquent for failing to report for a physical examination. Pursuant to 32 C.F.R. §1631.7(a), he also was selected and ordered to report for induction notwithstanding the fact that he had not taken a physical examination and thus (1) had not been found acceptable for service in the Armed Forces, and (2) had not been mailed a new "Statement of Acceptability" (DD Form No. 62) to that effect. *But for his being declared delinquent, he could not have been ordered to report for induction* under then existing regulations[12] without being found acceptable for service and with-

[12] Section 1631.7(a) was amended by Executive Order No. 11537, 35 F.R. 9991, of June 16, 1970 to provide that:

> "Notwithstanding Part 1628 or any other provision of these regulations, when a registrant classified in Class I-A or Class

out being mailed a Statement of Acceptability.[13] Since the delinquency regulations have been declared unauthorized and constitutionally invalid, petitioner's induction order based solely upon his status as a delinquent must also be held to be invalid. *United States* v. *Fox, supra; Zack* v. *Benson, supra.*

I-A-O has refused or otherwise failed to comply with an order of his local board to report for and submit to an armed forces physical examination, he may be selected and ordered to report for induction even though he has not been found acceptable for service in the Armed Forces and a Statement of Acceptability (DD Form 62) has not been mailed to him, and in such a case the armed forces physical examination shall be performed after he has reported for induction as ordered and he shall not be inducted until his acceptability has been satisfactorily determined."

As recognized by the *Fox* panel, 454 F.2d at 596, n. 2, this amendment is the simple answer to the fear of Judge Hauk (5a) and perhaps shared by the *Davis II* panel, that the Selective Service System would somehow cease to function if petitioner's arguments prevail.

[13] The government, in its petition for rehearing in *Fox* at p. 17, argued that the application of *Gutknecht* to cases such as *Davis* and *Fox* was improper because no prejudice accrued by virtue of the provisions of ¶3-18 of AR 601-270, SSLR 2246, which required that a complete physical examination be administered on the day of the delinquent's induction. Of course this is still prejudicial, because a registrant who has not been declared delinquent is entitled to both a pre-induction physical examination, 32 C.F.R. §§1628.10 et. seq., and a second physical examination on the day of induction pursuant to Army Regulations, see AR 601-270. But even in the absence of prejudice the government's position misreads the basis of the *Gutknecht* decision. In *Clay* v. *United States*, 403 U.S. 698 (1971) this Court recognized that the federal judiciary had a specific interest in insuring the legal integrity of the Selective Service System by requiring that a man's induction not be accomplished through unlawful means. Quoting its prior decision in *Sicurella* v. *United States*, 348 U.S. 385, 392 (1955), this Court stated that *"the integrity of the Selective Service System demands"* that an induction not be accomplished by illegal procedures. 403 U.S. at 704 (emphasis added). No less can be said for delinquency cases. See *Battiste* v. *United States*, 428 F.2d 801, 802 (5th Cir. 1970).

The effect of this Court's holding in *Gutknecht*, as explicated by the decision in *Fox* is clear: upon petitioner's failure to report for a physical examination, the only option open to the local board consistent with the mandate of the statute, prior to the amendment of §1631.7, was to report him to the United States Attorney for prosecution for that violation. *Fox, supra*, at 596. He could not be alternatively processed for induction. The order was consequently invalid and the indictment should have been dismissed on this ground. By rejecting this argument, the *Davis III* panel's decision creates an intracircuit conflict which now only this Court can resolve, inasmuch as the Ninth Circuit itself has refused to decide the issue either via *en banc* consideration or by a panel decision on the merits (12a, 19a).

Nowhere in the opinion below is there any intimation by the *Davis III* panel that petitioner's case, on its facts, does not come within the *Fox* rule. Rather, relying on *Odom, supra*, there is merely an unexplained refusal to apply *Fox* to *Davis*, "under circumstances such as here presented," 472 F.2d at 596 (19a). What "circumstances" require such a differentiation are left entirely to speculation by the Court of Appeals' cryptic denial of relief.

The bizarre result is that the Ninth Circuit now apparently has *two* rules, the *Fox* rule that a delinquency induction without a pre-induction physical examination is *per se* unlawful, and the contradictory *Davis* rule. District Judges within the Circuit, and, indeed subsequent panels of the Court of Appeals, will be at liberty to choose between the two, and the intracircuit confusion[14] will degenerate into

[14] The prior certiorari petition, *Davis* v. *United States*, 71-661 (Oct. Term, 1971), pp. 8 and 11, n. 3, set forth in some detail the proliferation of confusing decisions within the Ninth Circuit.

chaos unless this Court settles the question. See Stern and Gressman, SUPREME COURT PRACTICE 160-161 (1969).

Certiorari should therefore be granted, the *Fox* rule should be adopted, and the judgment of the Court below should be vacated, with instructions to reverse the district court's denial of post-conviction relief under 28 U.S.C. §2255, and to dismiss the indictment.

III.

Certiorari should be granted because the decisions below, which the Court of Appeals has declared to be in full force and effect, are inconsistent with this Court's decision in *Gutknecht* v. *United States*, 396 U.S. 295 (1970), and in conflict with decisions of the Fifth and Fourth Circuits.

The Court below has declared *Davis II* to be "the law of the case" (19a), notwithstanding its plain inconsistency with its own later decision in *Fox, supra*. This seemingly irrational result was reached because of the holding of the *Davis III* panel that *Odom* v. *United States*, 455 F.2d 159, 160 (9th Cir. 1972) foreclosed consideration of post-appeal charges in the law. Petitioner contends that the Court below erred, that certiorari should be granted to settle the *Odom* question, and that the Court below should be directed to vacate its judgment in *Davis III*, to reverse the district court's denial of post-conviction relief under 28 U.S.C. §2255, and to dismiss the indictment. See Points I and II, *supra*, pp. 11-19. Petitioner also urges that the decisions below are in conflict with *Gutknecht* v. *United States, supra*, and with the decisions of the Fifth Circuit in *Battiste* v. *United States*, 428 F.2d 801 (1970), and of the Fourth Circuit in *United States* v. *Dobie*, 444 F.2d 417 (1971).

a) *The "law of the case."* The district court refused to hold that delinquency induction without a pre-induction physical examination, and a statement of acceptability, was in and of itself a violation of the *Gutknecht* doctrine. It took the position that not every delinquency induction was a *Gutknecht* violation, but that it was incumbent on the defendant to prove that his induction was actually "accelerated", by establishing that "he was ordered for induction at a younger age than he would have been had he not been declared a Delinquent" (9a). The *Davis II* panel affirmed, and the *Davis III* panel held this to be the unalterable "law of the case", notwithstanding *Fox's* holding that evidence of acceleration is irrelevant, since a declaration of delinquency causes an induction to be accelerated "as a matter of law", 454 F.2d at 595.

b) *Application of the Gutknecht doctrine.* This Court has never explicitly ruled on the lawfulness of delinquency induction without a pre-induction physical examination. But see *Peet* v. *United States*, 399 U.S. 523 (1970), vacating 420 F.2d 549 (9th Cir. 1969). Petitioner respectfully urges however, that the principle of *Gutknecht*—the invalidation, as Congressionally unauthorized, of all delinquency powers of Selective Service local boards—compels a holding that delinquency induction without a pre-induction physical examination is no less vulnerable than any other exercise of delinquency power. This was the holding in *Fox*, which was articulated after a careful analysis of the regulations, and it has not been challenged or questioned by any subsequent decision.

c) *Inter-circuit conflict.* Assuming as we paradoxically must that *Davis II* is still good law in the Ninth Circuit,

it stands in sharp conflict with decisions of other circuits. In *Battiste* v. *United States, supra,* the Fifth Circuit explicitly declined to be drawn into consideration of acceleration in fact, because even if not proven, "we would hold the induction order invalid. It is expressly based upon a regulation that the Supreme Court held illegal in Gutknecht, and we cannot nullify the clear holding of that court on the basis of isolated observations in the opinion." 428 F.2d at 802.

In *United States* v. *Dobie, supra,* the Fourth Circuit held, somewhat more guardedly than the Fifth Circuit in *Battiste,* that, in the case of a delinquency induction, acceleration is presumed, and the government must sustain a heavy burden to disprove it. The Fourth Circuit expressly rejected opinion evidence of the local board clerk, and carefully outlined the objective documentary evidence which was necessary. Moreover, the Fourth Circuit ruled that the test was not whether younger men were called at the same time as or before defendant, but whether older men were available and uncalled, 444 F.2d at 420-421.

In petitioner's case, the district court on remand after *Davis I* made a finding of no acceleration precisely on the erroneous theory and insufficient evidence rejected by the Fourth Circuit in *Dobie.*

Thus the decisions below are inconsistent with *Gutknecht,* and in sharp conflict with decisions of two other circuits. Certiorari should be granted to clarify the application of the *Gutknecht* doctrine, and to settle the inter-circuit conflict.

CONCLUSION

For all of the foregoing reasons certiorari should be granted and the decision below reversed and the indictment dismissed.

Respectfully submitted,

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* Attorneys for petitioner gratefully acknowledge the assistance of Mr. Edwin J. Oppenheimer, law clerk, New York Civil Liberties Union.

1st Court of Appeals Opinion
432 F.2d 1009
(Davis I)

United States v. Davis, No. 26415 (9th Cir. Nov. 9, 1970)

Per curiam: (Chambers, Wright & Kilkenny, JJ.):

The case is remanded without limitation of scope but especially for consideration of the case in the light of the intervening decision of Gutknecht v. United States, 396 U.S. 295.

The parties may make their issues in district court by appropriate motions of either.

Any new appeal should be expedited.

The present bail order will remain in effect.

Oral Findings of District Court After Remand

• • • • •

As to Issue No. 1, was there an acceleration of the induction of Mr. Davis contrary to the ruling in Gutknecht vs. United States, Supreme Court case. The facts are, and I so find, that the Defendant Davis was given his order for induction on June 20, 1967. He was ordered to report—the reporting date was given, I should say, as July 11, 1967. That appears at page 47 of Exhibit 1. On that date as of that date when he was given this order for induction there were at least four registrants on the delivery list, or the call list, of November 15, 1966 which had been called—who had been called up with birth dates after the birth date of the defendant; the defendant's birthday being July 6, 1946.

These registrants who were on the call for November 15, 1966 having respectively been born as follows: Jenkins, July 24, 1946, Salkin, November 3, 1946, Sayles, November 25, 1946 and Smith, December 4, 1946—excuse me, they were born after, I should say, after Mr. Davis and were on the call prior to his order for induction before he appeared on the delivery list. Therefore being younger than he with—since they were younger than he, he was in the proper order of call within the regular order of call since he was older than they, and they were upon the order of call earlier than he was. I am referring to Exhibit 2, page 2.

Turning to another exhibit here, Exhibit 3, there were no, as far as we know, and as far as appears, no registrants on that call, March 7, 1967, who were younger than the Defendant Davis.

Turning to Exhibit 4, we find 17 on the regular call of July 11, 1967 which is prior to the defendant's date for re-

der of induction who were on that call for the month of July, 1967 the same date that Mr. Davis was on the call list as appears on page 1 as a delinquent. He was on the call list as a delinquent. There were at least 17 others on the same call list who had birth dates after or who were therefore younger than Mr. Davis.

I refer to those listed as having been born in 1947 and testified to by Mrs. Krisinger starting with Burke on page 3 of Exhibit 4, and going over to page 4 winding up with Registrant Harding.

Therefore I must necessarily find, in my view, and do so find, that under the facts the Defendant Davis was not ordered up out of the call, the regular call for registrants for induction on the regular delivery list when he was called up. As a matter of fact, there were 17 plus 4—21 others were younger than he who were called up either before or at the same time he was on the order of call, and to me that means that there was no acceleration.

Now, turning to the second issue. Even if there were acceleration in a technical sense, that is not acceleration out and beyond and different from his proper date of birth order of call, even if there could be considered some technical acceleration in that he may have been called up as a delinquent when he might not have been called up as a non-delinquent at that particular moment, even though it would be within the proper order of call at that time which was based upon oldest men going up first, or being called up first, even if there were this technical acceleration, still I do not find this so-called affectation or prejudicial affection of substantial rights, or prejudice to substantial rights of the Defendant Davis that in my view the cases in the Ninth Circuit and cases elsewhere, including Gutknecht, require

as a part of acceleration in order to hold that a defendant should not have been convicted or should not be convicted for violation of the order for induction.

It seems to me—well, I so find that here there was no prejudicial effect upon the substantial rights of Davis. We don't have here, as there were in the Thaxter case, United States vs. Paul Norman Thaxter, Court of Appeals Ninth Circuit No. 25709, January 8, 1971, there was no substantial affectation of his rights by prejudicial result upon any conscientious objector claim as there was in Thaxter. We don't have that here in Davis.

I don't see any other prejudicial effect, because even though he didn't take his physical examination, and there was no statement of acceptability, that is not required, as I see it, under 1631.7, a regulation which has not been outlawed or declared unconstitutional or illegal by Gutknecht, and which provides that one who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact he has not been found acceptable for service in the Armed Forces, and regardless of whether or not a statement of acceptability, DD62, has been mailed to him. And what is a delinquent as defined in 1602.4 of 32 Code of Federal Regulations is a person required to be registered under the Selective Service law who fails or neglects to perform any duty required by him under the terms of the Selective Service law," and this 1602.4 has not been outlawed either by Gutknecht.

So my conclusions of law on these two issues are that based upon the findings of fact that I have made just now are that No. 1 there is no violation of the strictures of Gutknecht in that there was no acceleration of the kind outlawed by Gutknecht; and secondly, if there was any acceleration of the induction, when I said acceleration I

meant acceleration of induction—I wish the notes to show that. I don't find any acceleration of induction as a matter of law; and secondly, assuming there was acceleration of induction in a technical sense as a matter of law, still there was no affectation prejudicially or adversely of the defendant's substantial rights under the Military Selective Service Act of 1967 or otherwise.

There is no violation of constitutional rights in what was done here by this Draft Board 101.

It is my conclusions buttressed by reasoning that I found in United States vs. Crocker, which I think essentially points up why the court must come to this conclusion. Where you have a defendant, as pointed out in Crocker, and I think we have a situation here, who refuses to report for physical examination, as here and as in Crocker, if we were to follow the line of argument presented by the defense here we would have to say he would then be declared a delinquent. But having been declared a delinquent he could not be ordered for induction because as a delinquent that would "accelerate his induction" and automatically adversely affect his substantial rights. All he would have to do is not report for induction. Then he could be free from ever being prosecuted for failing to report for induction.

Such an argument, it seems to me, would stultify and render negatory and completely unworkable the entire Selective Service System. Every registrant, if he didn't want to go in, could avoid prosecution merely by refusing to take his physical, waiting until he is declared delinquent, called up for induction, even though he is within his age group and probably within the regular call by age. In other words, younger people had already been called before him and at the same time, younger people than he. He could just sit

and refuse to go up on the order for induction after having refused to take the physical and then not be prosecuted on a theory that there was a sort of automatic acceleration that way, an automatic adverse affectation prejudice to his substantial rights.

Now, the most the Ninth Circuit has said in my view is that if there is an acceleration, and they said this in the Thomas case, if there is an acceleration and if the acceleration adversely affects—prejudicially affects the substantial rights of the defendant, then the induction order is void under Gutknecht, and he cannot be convicted. But whereas here there is no acceleration out of the natural and ordinary and regular order of call, whether it be as here in the Davis case under the call by age groups, the oldest first in a given year of birth and the youngest next, and where the defendant has been called up even as a delinquent after others have been put on the call who are younger than he, where we have that situation, and particularly where we don't have any substantial prejudice or adverse effect upon his substantial rights, that is where we don't have the Thaxter situation where the delinquency classification and the order for induction substantially affected his rights—because as pointed out in Thaxter it adversely affected his rights to claim conscientious objector status. Where we don't have those things, it seems to me the Gutknecht decision of the Supreme Court does not require reversal of conviction for failure to report for induction as ordered.

District Court's Findings of Fact and Conclusions of Law After Remand

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 3207-AAH-CD

On Appeal: No. 26415

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

JOSEPH ANTHONY DAVIS,

Defendant.

This matter came before the Honorable A. Andrew Hauk, United States District Judge, on February 2, 1971, for hearing on remand pursuant to order of the Court of Appeals for the Ninth Circuit dated November 9, 1970. During the hearing, the Government presented testimonial evidence and documentary evidence (Exhibits 2, 3, 4 and 5). Arguments were heard on defendant's Motion For Judgment of Acquittal On Remand and the Government's opposition thereto. The Court having heard the oral arguments, testimonial evidence, and having considered the memoranda of counsel and all the files and records of this case, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Defendant Joseph Anthony Davis is a registrant of Local Board No. 101, Los Angeles, California, having registered on October 4, 1963.

2. Defendant was ordered to report for Physical Examination on October 8, 1965, and, failing to do so, was declared Delinquent on May 4, 1966.

3. Defendant was never mailed a Statement of Acceptability (DD Form 62).

4. On June 20, 1967 defendant was ordered by Local Board 101 to report as a Delinquent for induction on July 11, 1967.

5. There were at least 17 other non-Delinquent registrants of Local Board 101, excluding Volunteers, who were ordered to report for induction on July 11, 1967, on the regular Delivery List and who were younger than defendant.

6. At least 4 non-Delinquent registrants of Local Board 101, who were not Volunteers, and who were younger than defendant, were ordered to report for induction as early as November 15, 1966.

7. Had defendant not been declared Delinquent, he would have been ordered to report for induction on or before November 15, 1966.

8. Had defendant reported as ordered on July 11, 1967, he would have been given a complete physical examination prior to being inducted.

9. To the extent these Findings of Fact also contain Conclusions of Law, they shall be deemed incorporated within the Conclusions of Law.

Conclusions of Law

1. The Delinquency Regulations may not be used to deny a registrant a deferment or exemption or to accelerate his induction.

2. At all times relevant to this case, defendant was properly classified 1-A and was not entitled to any deferments or exemptions.

3. A registrant's induction as a Delinquent is considered "accelerated" within the meaning of *Gutknecht* v. *United States*, 396 U.S. 295 (1970), when he is ordered for induction at a younger age than he would have been had he not been declared a Delinquent. Accordingly, defendant's induction order was not "accelerated."

4. Selective Service Regulation 1631.7 (32 C.F.R. 1631.7) is not unconstitutional on its face and is not unconstitutional as applied to Delinquents except when it is used to accelerate their induction orders.

5. Defendant's substantial rights were not prejudiced by the Local Board's ordering him to report for induction without first giving him a physical examination and sending him a Notice of Acceptability (DD Form 62). The failure to give such an examination and such Notice of Acceptability were caused by defendant's own failure to report for physical examination on October 8, 1965, as

ordered; moreover, he would have received a complete physical examination prior to induction had he reported on July 11, 1967, as ordered.

6. To the extent these Conclusions of Law also contain Findings of Fact, they shall be deemed incorporated within the Findings of Fact.

Order

Pursuant to the foregoing Findings of Fact and Conclusions of Law, it is ordered:

(1) That the motion of defendant Joseph Anthony Davis for judgment of acquittal be denied; and

(2) That the judgment of conviction heretofore entered is hereby affirmed.

It is further ordered that the foregoing Findings of Fact and Conclusions of Law and this Order be transmitted forthwith to the Court of Appeals for the Ninth Circuit together with the record on appeal and memoranda, transcript and Exhibits of the proceedings on remand.

It is further ordered that the cost of the transcript on remand shall be borne by the Government.

Dated this 16th day of March, 1971.

A. Andrew Hauk
United States District Judge

2nd Court of Appeals Opinion
447 F.2d 1376
(Davis II)

United States v. Davis, No. 26,415 (9th Cir. Aug. 12, 1971)

Per curiam (Chambers, Kilkenny & Powell, JJ.):

The judgment of conviction in this selective service case is affirmed.

Davis contends that the implication of Gutknecht v. United States, 396 U.S. 295, and other cases require a finding here that induction was accelerated because of his delinquency. On the record, we think not.

United States v. Davis (9th Cir. 1970), 432 F.2d 1009; Hirschhiser v. United States (9th Cir. July 22, 1971) 71-1301; and United States v. Pennington (9th Cir. 1971), 439 F.2d 145, require affirmance. We find United States v. Dubie (4th Cir., June 28, 1971) #14,236, distinguishable.

The mandate will issue now.

Order of Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

No. 26,415

United States of America,

Plaintiff and Appellee,

—v.—

Joseph Anthony Davis,

Appellant.

Before:

Chambers and Kilkenny, *Circuit Judges*, and Powell, *District Judge*.

The petition for a rehearing is denied. The suggestion for a rehearing en banc is rejected.

All active circuit judges of the court have been advised of the suggestion for a rehearing en banc and none has requested it.

Order Denying Certiorari

No. 71-661

JOSEPH ANTHONY DAVIS,

Petitioner,

v.

UNITED STATES.

405 US 933, 30 L Ed 2d 809, 92 S Ct 939.

February 22, 1972. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. Mr. Justice Douglas is of the opinion that certiorari should be granted.

Same case below, 447 F2d 1376.

Order Denying Out of Time Petition for Rehearing en Banc

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

No. 26415

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH ANTHONY DAVIS,

Appellant.

Appeal from the United States District Court
Central District of California

Before:

CHAMBERS and KILKENNY, *Circuit Judges,* and POWELL, *District Judge.**

It appearing that the Supreme Court of the United States denied certiorari in this cause on the 22nd day of February, 1972, and that a "Motion for Extension of Time in Which to File a Petition for Rehearing" and other relief, was not tendered for filing in this court until the 19th day of April, 1972,

IT IS ORDERED that the tender be, and the same is hereby, rejected and the Clerk is directed to return the motion to the appellant.

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* The Honorable Charles L. Powell, United States District Judge for the Eastern District of Washington, sitting by designation.

Reporter's Transcript of Proceedings Denying Petitioner's Motion Under 28 U.S.C. §2255

IN THE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE A. ANDREW HAUK, *Judge Presiding*

Case No. 3207—Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH ANTHONY DAVIS,

Defendant.

Place: Los Angeles, California

Date: Monday, June 5, 1972

Los Angeles, California, Monday, June 5, 1972 10:00 A.M.

(Other court matters.)

The Clerk: Number Three on the calendar, 3207 Criminal, United States of America versus Joseph Anthony Davis.

Mr. Sweeney: Paul Sweeney for the Government, your Honor.

Mr. Kallen: Good afternoon, your Honor, Daniel Kallen for the defendant who is present.

* * * * *

The Court: * * *

We are now filing and spreading on the record the following, and I will take them by chronology.

September 13, 1971, the order of the Court of Appeals denying the petition for rehearing, also denying the suggestion for rehearing in blank.

November 11, 1971, the denial of the motion to recall the mandate.

February 28, 1972, denial of petition for writ of certiorari. This is by the Supreme Court of the United States and a certified copy was dated in the Court of Appeals May 31, 1972.

Finally, May 22, the order of the Court of Appeals rejecting a tendering of motion for extension of time in which to file a petition for rehearing with the direction that the motion be returned to the appellant.

All right, those in that order are hereby filed and spread.

Now, the defendant is here before the Court for the commitment under the mandate of the Court of Appeals and the Supreme Court.

In that connection, counsel for the defendant has filed here this afternoon and the Court has read and considered the motion pursuant to 28 U.S. Code 2255, or in the alternative, a motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure—denied.

There is also a motion to enlarge the defendant on bail pending disposition of these motions pursuant to 28 U. S.

Code 2255 and Rule 35 of the Federal Rules of Criminal Procedure—denied.

We are ready for the commitment.

The defendant is committed. The marshal will take him into custody for the service of his sentence.

Mr. Kallen: Thank you, your Honor.

The Court: All right.

Third Court of Appeals Opinion
472 F.2d 596
(Davis III)

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

No. 72-2438

Dec. 26, 1972

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH ANTHONY DAVIS,

Defendant-Appellant.

Before:

CHAMBERS and KILKENNY, *Circuit Judges,* and TAYLOR,* *District Judge.*

Prisoner moved to vacate judgment. The United States District Court for the Central District of California, A. Andrew Hauk, J., denied motion and the prisoner appealed. The Court of Appeals held that where issue was decided on direct appeal from conviction it could not be relitigated on motion to vacate judgment as the decision on direct appeal was the law of the case.

Affirmed.

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* The Honorable Fred M. Taylor, Senior District Judge for the District of Idaho, sitting by designation.

PER CURIAM:

This is an appeal from the denial of appellant's 28 U.S.C. § 2255 motion. The issue here presented is precisely the same as the one presented and decided adversely to appellant in United States v. Davis, 447 F.2d 1376 (CA9 1971), cert. denied 405 U.S. 933, 92 S.Ct. 939, 30 L.Ed.2d 809 (1972).

This circuit is firmly committed to the rule that where an issue has been decided on direct appeal from a conviction, it cannot be relitigated again on a § 2255 motion. The decision on the direct appeal is the law of the case. Odom v. United States, 455 F.2d 159, 160 (CA9 1972). Appellant argues that United States v. Fox, 454 F.2d 593 (CA9 1971) created new law by overruling United States v. Davis and that he should be permitted to fall within the perimeter of the new rule. Aside from the fact that *Fox* does not even suggest overruling *Davis*, *Fox*, 454 F.2d p. 594,[1] the new law, or change in law, rule is not applied in this circuit under circumstances such as here presented. Odom v. United States, *supra*.

Judgment affirmed.

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[1] For that matter, an in banc proceeding would be required to overrule a previous panel decision.

Selective Service File—Minutes of Action

(Registrant Will Make No Entries on This Page)

Date	Minutes of Actions by Local Board and Appeal Board and on Appeal to the President
FEB 3 1965	1A 1A
FEB 3 1965	Form 110 Mailed
FEB 16 1965	SSS Form 223 mailed for physical on MAR 4 1965
3-25-65	SSS Form 225 dtd 3-17-65 shows failed to report for Pre-
JUL 29 1965	SSS Form 127 mailed
SEP 19 1965	SSS Form 223 mailed for physical on OCT 8 1965
10/21/65	Jacket returned - failed to report for physical
12/6/65	Mailed Cal Form 301
2 1966	SSS Form 127 mailed
1966	R.L. Smith
5/1/66	SSS Form 301 mld to reg.; cc to SSO
FEB 21 1967	SSS Form 252 mailed for Induction on MAR 7 1967 PAPERS RET - FAILED
MAR 17 1967	File sent to SSO
Apr 4, 1967	File returned from SSO
APR 20 1967	SSS Form 252 mailed for Induction on MAY 11 1967 no del
8/23/67	SSS Form 150 issued to registrant.
NOV 15 1967	File sent to SSO —10-25-67 File ret'd from SSO.
11-6-67	SSS NCSC 301 mld to US ATTORNEY, CC SSO
11/22/67	File forwarded to Southern Area Hqs. for prosecutive study
	Lacy Sutherland (Davis) 226-0432

(Continued on Page 7)

21a

Selective Service File—Delinquency Warning

Approved By The Director of Selective Service

Mailed April 6, 1966
To
[illegible]
[illegible], Calif.

SELECTIVE SERVICE SYSTEM
STATE OF CALIFORNIA
DELINQUENCY WARNING

Local Board No. 101
Los Angeles County
1300 Eastwood Blvd.
Los Angeles Calif. 90024
(Local Board Stamp)

December 6, 1965
(Date of Mailing)

Selective Service No.			
4	101	46	826

To Joseph Anthony DAVIS
(First) (Middle) (Last)

Address P.O.Box 46-243
(Street and Number or RFD Route)

Los Angeles Calif. 90046
(City, Town, or Village) (County) (State) (Zip Code)

You are hereby notified that this Local Board is considering declaring you to be delinquent because of your failure to perform the following duty or duties required of you under the selective service law:

Failed to report for Armed Services physical examination on October 8, 1965.

You are hereby directed to report to this Local Board immediately in person or by mail, or to take this notice to the Local Board nearest you for advice as to what you should do.

Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act, as amended, and such failure may result in your being declared delinquent. A delinquent registrant loses his eligibility for deferment and may be placed in a class immediately available for service. He is ordered for induction ahead of other registrants.

This Local Board may excuse your delinquency status if it finds that the reason for noncompliance was not willful and you comply. In any event, this document becomes part of your permanent Selective Service file and should such delinquency be excused any other noncompliance on your part could result in your immediate induction.

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(SSS Form 304)

Emilie W. Chapman
(Member or Clerk of Local Board)
Emilie W. Chapman, Clerk

Selective Service File—Delinquency Notice

SELECTIVE SERVICE SYSTEM

DELINQUENCY NOTICE

May 4, 1966
(Date Became Delinquent)

May 4, 1966
(Date of Mailing)

Local Board No. 101
Los Angeles County
1301 Westwood Blvd.
Los Angeles, Calif. 90024
(Local Board Stamp)

SELECTIVE SERVICE NO.			
4	101	46	88

To Joseph (First) Anthony (Middle) Davis (Last)

Address 3761½ Manlo
(Street and Number or RFD Route)

Los Angeles (City, Town, or Village) L.A. (County) California (State)

1. You are hereby notified that this Local Board has declared you to be a delinquent because of your failure to perform the following duty or duties required of you under the selective service law:

Failed to report for Armed Forces Physical Examination Oct. 8, 1965.
Failed to keep Local Board informed of current address.

2. You are hereby directed to report to this local board immediately, either in person or by mail.

3. Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act, as amended, which is punishable by imprisonment for as much as 5 years or a fine of as much as $10,000, or by both such fine and imprisonment.

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W. K. Bishop (Clerk of Local Board)

SSS Form No. 304 (2-64)

(See Instructions on Reverse Side)

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Selective Service File—1st Order to Report for Induction

SELECTIVE SERVICE SYSTEM

Approved Not Required.

ORDER TO REPORT FOR INDUCTION

RECEIVED
LOCAL BOARD GROUP "C"
FEB 23 1967

Local Board No. 101
Los Angeles County
1901 Westwood Blvd.
Los Angeles, Calif. 90024

(Local Board Number)

President of the United States,

To

Joseph Anthony Davis
3781 Pueblo Avenue
Los Angeles, California 90007

1901 WESTWOOD BLVD
LOS ANGELES, CALIF. 90024

February 21, 1967
(Date of mailing)

SELECTIVE SERVICE NO.			
4	101	46	328

1-A

ING:

You are hereby ordered for induction into the Armed Forces of the United States, and to report
L.A. EXAMINING AND INDUCTION STATION
1033 S. Broadway, Los Angeles, Calif.
(Place of reporting)

MAR 7 1967 at 7:30 A.M.
(Date) (Hour)

warding to an Armed Forces Induction Station.

E. M. Bush
(Member or clerk of Local Board)

E.M. Bush

IMPORTANT NOTICE
(Read Each Paragraph Carefully)

F YOU HAVE HAD PREVIOUS MILITARY SERVICE, OR ARE NOW A MEMBER OF THE NATIONAL D OR A RESERVE COMPONENT OF THE ARMED FORCES, BRING EVIDENCE WITH YOU. IF YOU E CLASSES, BRING THEM. IF MARRIED, BRING PROOF OF YOUR MARRIAGE. IF YOU HAVE ANY SICAL OR MENTAL CONDITION WHICH, IN YOUR OPINION, MAY DISQUALIFY YOU FOR SERVICE IN ARMED FORCES, BRING A PHYSICIAN'S CERTIFICATE DESCRIBING THAT CONDITION, IF NOT EADY FURNISHED TO YOUR LOCAL BOARD.

ld documents are required to substantiate dependency claims in order to receive basic allowance for quarters. Be e take the following with you when reporting to the induction station. The documents will be returned to you. (a) LAWFUL WIFE OR LEGITIMATE CHILD UNDER 21 YEARS OF AGE—original, certified copy or photostat of a d copy of marriage certificate, child's birth certificate, or a public or church record of marriage issued over the sig- and seal of the custodian of the church or public records; (b) FOR LEGALLY ADOPTED CHILD—certified court of adoption; (c) FOR CHILD OF DIVORCED SERVICE MEMBER (Child in custody of person other than claim- (1) Certified or photostatic copies of receipts from custodian of child evidencing serviceman's contributions for sup- and (2) Divorce decree, court support order or separation order; (d) FOR DEPENDENT PARENT—affidavits owing that dependency.

ring your Social Security Account Number Card. If you do not have one, apply at nearest Social Security Adminis- tion. If you have life insurance, bring a record of the insurance company's address and your policy number. enough clean clothes for 3 days. Bring enough money to last 1 month for personal purchases.

he Local Board will furnish transportation, and meals and lodging when necessary, from the place of reporting to duction station where you will be examined. If found qualified, you will be inducted into the Armed Forces. If not qualified, return transportation and meals and lodging when necessary, will be furnished to the place of reporting.

u may be found not qualified for induction. Keep this in mind in arranging your affairs, to prevent any undue hard- if you are not inducted. If employed, inform your employer of this possibility. Your employer can then be prepared ceive your reemployment if you are not inducted. To protect your right to return to your job if you are not inducted, st report for work as soon as possible after the completion of your induction examination. You may jeopardize your employment rights if you do not report for work at the beginning of your next regularly scheduled working period after you returned to your place of employment.

Willful failure to report at the place and hour of the day named in this Order subjects the violator to fine and imprison- t. Bring this Order with you when you report.

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If you are so far from your own local board that reporting in compliance with this Order will be a serious hardship, ediately to any local board and make written request for transfer of your delivery for induction, taking this Order

(Previous editions may be used until exhausted.)

Selective Service File—2nd Order to Report for Induction

SELECTIVE SERVICE SYSTEM

ORDER TO REPORT FOR INDUCTION

DELINQUENT

Local Board No. 78
Los Angeles County
1701 Westwood Blvd.
Los Angeles, Calif. 9[illegible]

The President of the United States,

To

Joseph Anthony Davis
868 Carrol Avenue
St. Paul, Minnesota

June 20, 1967

4	101	46	88

GREETING:

You are hereby ordered for induction into the Armed Forces of the United States, and to report

L.A. Examining and Entrance Station
1033 S. Broadway, Los Angeles, Calif.

on July 11, 1967 at 7:30 A. M.

for forwarding to an Armed Forces Induction Station.

W. M. Bishop

IMPORTANT NOTICE
(Read Each Paragraph Carefully)

IF YOU HAVE HAD PREVIOUS MILITARY SERVICE, OR ARE NOW A MEMBER OF THE [illegible] GUARD OR A RESERVE COMPONENT OF THE ARMED FORCES, BRING EVIDENCE WITH YOU. IF YOU WEAR GLASSES, BRING THEM. IF MARRIED, BRING PROOF OF YOUR MARRIAGE. IF YOU HAVE A PHYSICAL OR MENTAL CONDITION WHICH, IN YOUR OPINION, MAY DISQUALIFY YOU FOR SERVICE IN THE ARMED FORCES, BRING A PHYSICIAN'S CERTIFICATE DESCRIBING THAT CONDITION, IF NOT ALREADY FURNISHED TO YOUR LOCAL BOARD.

Valid documents are required to substantiate dependency claims in order to receive basic allowance for quarters [illegible] to take the following with you when reporting to the induction station. The documents will be returned to you. (a) FOR LAWFUL WIFE OR LEGITIMATE CHILD UNDER 21 YEARS OF AGE—original, certified copy or photostatic certified copy of marriage certificate, child's birth certificate, or a public or church record of marriage issued over the signature and seal of the custodian of the church or public records; (b) FOR LEGALLY ADOPTED CHILD—certified order of adoption; (c) FOR CHILD OF DIVORCED SERVICE MEMBER (Child in custody of person other than the dependent)—(1) Certified or photostatic copies of receipts from custodian of child evidencing serviceman's contributions for support, and (2) Divorce decree, court support order or separation order; (d) FOR DEPENDENT PARENT—affidavit establishing that dependency.

Bring your Social Security Account Number Card. If you do not have one, apply at nearest Social Security Administration Office. If you have life insurance, bring a record of the insurance company's address and your policy number. Bring enough clean clothes for 3 days. Bring enough money to last 1 month for personal purchases.

This Local Board will furnish transportation, and meals and lodging when necessary, from the place of reporting to the induction station where you will be examined. If found qualified, you will be inducted into the Armed Forces. If found not qualified, return transportation and meals and lodging when necessary, will be furnished to the place of your

You may be found not qualified for induction. Keep this in mind in arranging your affairs, to prevent any unfavorable hardship if you are not inducted. If employed, inform your employer of this possibility. Your employer can then begin to continue your employment if you are not inducted. To protect your right to return to your job if you are not inducted, you must report for work as soon as possible after the completion of your induction examination. You may jeopardize your reemployment rights if you do not report for work at the beginning of your next regularly scheduled working period after you have returned to your place of employment.

Willful failure to report at the place and hour of the day named in this Order subjects the violator to fine and imprisonment. Bring this Order with you when you report.

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If you are so far from your own local board that reporting in compliance with this Order will be a serious hardship, go immediately to any local board and make written request for transfer of your delivery for induction, taking this Order

1-17-[illegible]

SSS Form 252 (Revised 6-20-66) (Previous printings may be used until exhausted.)